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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

JAMES A. KAY, JR.)

) WT DOCKET NO. 94-147

Licensee of 152 Part 90 Stations in the)
Los Angeles, California Area)

To: The Commission

ENFORCEMENT BUREAU'S
OPPOSITION TO MOTION FOR LEAVE TO FILE
SUPPLEMENT TO REPLY EXCEPTIONS

1. The Deputy Chief, Enforcement Bureau, by his attorneys, now opposes the "Motion for Leave to File Supplement to Reply Exceptions" filed by James A. Kay, Jr. (Kay) on January 4, 1999.¹

2. Kay seeks to supplement his Reply to Exceptions, asserting that the Wireless Telecommunications Bureau took a position regarding loading requirements in a recent letter by a Deputy Branch Chief² that is in conflict with the position advanced by the Bureau in this hearing. The Enforcement Bureau believes that the position advanced in the Letter Ruling and the position taken in the hearing are consistent, and that Kay has not shown that the Letter Ruling is relevant to the issues in the hearing.

¹ Kay's motion was filed and served without the referenced attachment on December 30, 1999. He filed his referenced attachment on January 4, 2000 after having served the Bureau with copies late on the day of January 3, 2000. Because this opposition is being filed within four business days after Kay's motion was properly filed on January 4, it is timely.

² Letter to Robert J. Keller, Esq., Harry A. Thompson, and Robyn G. Nietert, Esq. from Terry L. Fishel, Deputy Chief, Licensing and Technical Analysis Branch, Commercial Wireless Division, Wireless Telecommunications Bureau dated November 18, 1999 ("Letter Ruling").

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3. The record under issue (c) in this proceeding contains evidence showing that Kay violated his duty to share channels when he lacked sufficient loading to claim exclusive use of the channels. *See Bureau Exceptions*, pp. 11-15. The evidence demonstrates that the number of mobiles actually operating on Kay's systems was substantially below the number that he represented to the Commission. The record also shows that certain of Kay's authorizations canceled automatically as a matter of law for failure to construct or for permanently discontinuing operation. *See I.D.*, ¶¶ 220-222. Neither Kay nor the Bureau excepted to the Presiding Judge's conclusions under that portion of issue (c). Accordingly, there is no reason for the Commission to consider this matter in reviewing this case.

4. In the Deputy Branch Chief's letter decision, the Wireless Telecommunications Bureau agreed with Kay that Thompson should not be authorized to operate mobile units on his station because Thompson had not modified his authorization to permit his operation of mobile units prior to the deadline for construction. While Thompson had reported operating mobile units to the Commission in his April 23, 1993, FCC Form 800-A, the letter concluded that the reporting of operating mobiles was not a substitute for filing a license modification to operate those mobiles. The letter also denied Kay's request that the license be canceled because Kay had not demonstrated that the system failed to serve **any** mobiles (which would have meant that the license cancelled automatically). In the Thompson case, there was no dispute that mobiles were operating on the system because Kay acknowledged that Thompson's system was operational. *See Letter Ruling*, n.7. The Commission has held that even if a licensee is not authorized to use his own mobile units, a license will not be automatically canceled if there is evidence that mobile units authorized under other licenses are using the system as roamers. For example, in *Billy J.*

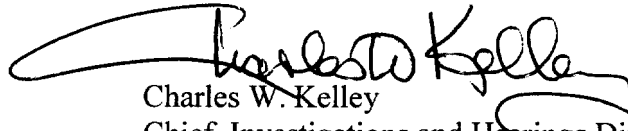
Rutledge, 14 FCC Rcd 6565, 6569 (1999), the Commission denied a finders preference request because a radio dealer had used mobile units authorized under another license on that station. As shown by the large number of co-channel authorizations licensed within reasonable proximity to Thompson's system (*see* Letter Ruling, n.5), a realistic assessment of the Los Angeles market indicates that the mobiles operating on that system were licensed on other systems, and so could operate as roamers on Thompson's station. Accordingly, Kay did not demonstrate that Thompson's license should be cancelled. While Kay had every opportunity to present evidence that these mobiles were not in fact roaming or to appeal the Letter Ruling, he did not do so.

5. Under these circumstances, there is clearly no inconsistency between the Letter Ruling and the Bureau's position in this proceeding. At this point in time, the two cases involve different issues (loading v. cancellation for failure to construct). Kay's argument that there was no evidence supporting the Bureau's position ignores his own admission that Thompson's system was operational. With respect to loading, the Letter Ruling held that Thompson could not use the roamers to get credit for loading on his system. Letter Ruling, p. 2. Thus, the Wireless Bureau's recent letter decision is in no way inconsistent with any position it took at the hearing. Moreover, if Kay disagreed with the Letter Ruling, he had every opportunity to file an application for review of that action. Kay's proposed supplement thus has no bearing on the issues before the Commission and must be rejected.

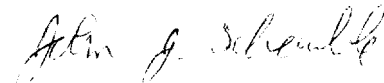
Accordingly, the Bureau asks the Commission to deny Kay's "Motion for Leave to File Supplement to Reply Exceptions" and to dismiss his proffered supplement.

Respectfully submitted,

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January 10, 2000

CERTIFICATE OF SERVICE

I, Brenda Lewis, a staff assistant with the Investigations and Hearings Division, Enforcement Bureau, certify that I have, on this 10th day of January, 2000, sent by first class mail (unless otherwise indicated), copies of the foregoing to:

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